

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the)	
800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land)	WT Docket No. 02-55
Transportation and Business Pool Channels)	DA 03-19

**COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION**

**CELLULAR TELECOMMUNICATIONS
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SUMMARY

The wireless industry remains committed to working with Public Safety and the other licensees in the 800 MHz band to address the ultimate goal of this proceeding -- resolution of interference problems. However, CTIA cannot support the proposal of the Joint Commenters. As CTIA has stated in its initial Comments, Reply Comments, Further Comments, and in these Supplemental Comments, the proposal from Nextel and the Joint Commenters is flawed, and other more timely and less complicated solutions exist in the record.

In particular, the most recent proposal from the Joint Commenters retains the problems CTIA identified with the original proposal, and adds some new concerns. The Joint Commenters' supplemental comments describe a plan that is dangerously flawed: it is incredibly complicated and resource intensive, relies on a risky installment payment type mechanism to fund the proposed realignment, creates an unfair advantage for some existing licensees within the 800 MHz band, and asks the Commission to violate Section 309 (j) of the Communications Act by giving Nextel spectrum for terrestrial wireless service without an auction. Even more importantly, it does not provide a timely solution to address an interference problem that needs immediate attention, fails to provide a long-term solution to the interference problem, and fails to provide Public Safety with upgraded equipment.

There are other alternatives in the record that do not suffer from the same deficiencies as the Joint Commenters' plan, including a proposal by CTIA, that would provide a better solution. CTIA submits that the Commission should adopt its alternative approach that incorporates three broad proposals for mitigating interference: 1) improved Public Safety equipment and focused CMRS-Public Safety interference mitigation efforts; 2) if necessary, interim rebanding *within* the 800 MHz band, and 3) relocation of 800 MHz Public Safety users to the 700 MHz band.

Finally, CTIA emphasizes that a key deficiency of the Joint Commenters' plan is that it unnecessarily rewards Nextel with a spectrum windfall in the 1.9 GHz band, enabling Nextel to occupy this extremely valuable spectrum block even before the rebanding efforts are begun, let alone completed. Granting Nextel the spectrum it requests is *not* the only way to achieve a successful rebanding of the 800 MHz band, as the Joint Commenters wrongly contend. Moreover, it would provoke contentious legal challenges that would undoubtedly delay the overall resolution of the Public Safety interference problem.

For these reasons, CTIA believes that the Commission should not implement the Joint Commenters' plan and should instead adopt CTIA's proposal. The Commission should conduct a rigorous cost/benefit analysis as part of any decision in this proceeding, and as these comments demonstrate, the costs in terms of time and resources of the Joint Commenters' Plan far outweigh the uncertain benefits and legal risk involved.

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The Cellular Telecommunications & Internet Association (“CTIA”)¹ submits these Comments in response to the Commission’s Public Notice (“PN”)² regarding the “*Supplemental Comments* of the Joint Commenters” filed with the Commission on December 24, 2002. The *Supplemental Comments* detail certain revisions to the 700 MHz, 800 MHz, and 1900 MHz Bands, address funding for rebanding, and propose mitigation efforts to address any remaining interference issues in the 800 MHz band.”³ As CTIA stated in its comments on the original Nextel proposal, and again in its comments on the original Joint Commenters’ proposal, there are better alternative solutions than the approach offered by the Joint Commenters to address the problem of interference into Public Safety operations in the 800 MHz band. The wireless

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² *Wireless Telecommunications Bureau Seeks Comment on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding*, WT Docket No. 02-55, DA 03-19 (rel. January 3, 2003) (“PN”).

³ *Supplemental Comments of the Consensus Parties*, WT Docket No. 02-55, (December 24, 2002) (“*Supplemental Comments*”).

industry remains committed to working with Public Safety and the other licensees in the 800 MHz band to address the ultimate goal of this proceeding -- resolution of interference problems.

I. INTRODUCTION

In its initial Comments, Reply Comments, and Further Comments in this proceeding, CTIA opposed Nextel's original band restructuring proposal⁴ and the Joint Commenters' initial proposal.⁵ CTIA presented an alternative approach that would significantly improve Public Safety communications in the 800 MHz band.⁶ The most recent proposal from the Joint Commenters retains the problems CTIA identified with the original proposal, and adds some new concerns. The Joint Commenters' supplemental comments describe a plan that is dangerously flawed: it is incredibly complicated and resource intensive, relies on a risky installment payment type mechanism to fund the proposed realignment, creates an unfair advantage for some existing licensees within the 800 MHz band, and asks the Commission to violate Section 309 (j) of the Communications Act by giving Nextel spectrum for terrestrial wireless service without an auction. Even more importantly, it does not provide a timely solution to address an interference problem that needs immediate attention, fails to provide a long-term solution to the interference

⁴ See *Promoting Public Safety Communications – Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs* (“Nextel Proposal”) (Nov. 21, 2001).

⁵ See *Joint Reply Comments of Aeronautical Radio Inc, et al.*, Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, WT Docket No. 02-55 (Aug. 7, 2002)

⁶ See *Comments of the Cellular Telecommunications & Internet Association*, Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, filed May 6, 2002, at 4-6 (“CTIA Comments”), see also *Reply Comments of the Cellular Telecommunications & Internet Association*, Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, filed Aug. 7, 2002, at 4-6 (“CTIA Reply Comments”); *Further Comments of the Cellular Telecommunications & Internet Association*, Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, filed Sept. 23, 2002 at 3-4 (“CTIA Further Comments”).

problem, and fails to provide Public Safety with upgraded equipment. There are other alternatives in the record that do not suffer from the same deficiencies as the Joint Commenters' plan, including a proposal by CTIA, that would provide better alternatives to the plan currently being considered by the Commission.

II. THE JOINT COMMENTERS' PROPOSAL IS NOT A VIABLE SOLUTION TO ADDRESSING INTERFERENCE PROBLEMS IN THE 800 MHz BAND

A. The Joint Commenters' Proposal Is Extraordinarily Complicated And Contains So Many Moving Parts That It Will Be Virtually Impossible To Implement.

The Joint Commenters' proposal involves 26 different deadlines, spread over 42 months, involving over 2500 licensees.⁷ It requires the relocation of all incumbent licensees from 806-809/851-854 MHz bands into 809-816/854-861 MHz, as well as the relocation of countless other licensees. To facilitate this realignment, the Joint Commenters' plan proposes a series of actions and transactions on behalf of the Joint Commenters, the Commission, and third parties, which raise numerous procedural and legal questions. The proposal requires the cooperation of all of the licensees in submitting themselves to negotiation, and possibly arbitration, in order to complete relocation. It also requires the frequency coordination of thousands of licenses, and then the simultaneous relocation of numerous Public Safety and non-Public Safety entities.

Before embarking on such a complicated and resource-intensive undertaking, the Commission must recognize that the mechanism chosen by the Joint Commenters fails to provide a timely solution to the CMRS-Public Safety interference problem. Rebanding will take close to four years to complete, and that is without factoring in any significant overruns.⁸ Even

⁷ See *Supplemental Comments* at Appendices A and D.

⁸ *Id.* at Appendix D.

at that point, interference will remain.⁹ The Commission cannot afford to wait four years for a solution that -- even according to its proponents¹⁰ -- will not fully address the interference problem. CTIA suggests below that there are more timely, and less difficult, solutions to implement.

In addition to being incredibly complicated, the proposal also suffers from additional procedural, equitable, and legal deficiencies. The Joint Commenters propose the creation of a Relocation Coordination Committee to “carry out certain frequency coordination, dispute resolution and licensing application responsibilities during the realignment process.”¹¹ The Commission and public safety entities are being asked to cede control of all elements of the relocation process to a non-governmental entity. Where has Congress delegated the authority for a third party such as the Relocation Coordination Committee to conduct arbitration on behalf of a Federal agency? The broad duties that would be given to this untested Committee and its multiple subcommittees to perform is a very risky proposition in the context of a transition this complex.

The proposal also suffers from a fundamental equitable flaw – there is no assurance incumbents will be made whole during the transition. Under the proposal, if the parties are at an impasse and a set amount of time has passed, all non-governmental licensees have to agree to submit to binding arbitration to address issues involving reimbursement. This element of the

⁹ *Id.* at 39 (“The Joint Commenters recognize, however, that no band plan can eliminate entirely all possibility of interference under all circumstances.”); *see also Supplemental Comments* at Appendix F-1 (“As described in Nextel’s September 23 comments, the Consensus Plan will reduce the probability of current CMRS – public safety intermodulation interference by more than 90 percent for many current NPSPAC licensees, and by as much as 65 percent for public safety licensees in the non-cellular block remaining closest to the new cellular channel block.”).

¹⁰ *Id.*

¹¹ *Id.* at 15.

proposal raises several questions. The majority of licensees do not receive any substantial benefit under the proposal, with most receiving only a one-for-one spectrum swap and no upgraded equipment.¹² Why should an incumbent be forced to incur *any* costs during the transition? Will the Commission force these licensees to submit to arbitration, causing them to absorb some of the cost of relocation?

Second, what happens when a Public Safety entity, which is not subject to binding arbitration, will not engage in any arbitration to address reimbursement with the Relocation Coordination Committee? Additionally, what happens when a Public Safety entity cannot agree with the Relocation Coordination Committee on the level of degradation in services it is willing to accept during a transition? In life or death communications, is it acceptable to force these entities to relocate? If several Public Safety entities within a region will not agree to relocate, what happens to the Joint Commenters' timetable, particularly when "simultaneous relocation" is proposed?¹³

Finally, the proposal requires the Commission to accept the word of Nextel that it will continue to fund the relocation of incumbent 800 MHz licensees throughout the almost four year process. As detailed below, Nextel's cooperation is premised on its receiving spectrum in the 1.9 GHz band, a proposition that would inevitably provoke a legal challenge. Moreover, it is easy to imagine a myriad of reasons outside of Nextel's control that could affect Nextel's ability to fund the transition to completion.

¹² *Id.* at Appendix A-4 ("Nextel estimates that 5% of the Business/Industrial/SMR radios will have to be replaced during realignment and that approximately 1% of the public safety radios will have to be replaced.").

¹³ *Id.* at 32, n.52. (The Joint Commenters have stated that with regard to NPSPAC and Public Safety licenses, simultaneous relocation is required because "NPSPAC licensed users are often capable of 'roaming' to Public Safety systems using Guard Band channels, particularly in the event of an emergency." *Id.*)

The items listed above are examples of just some of the numerous issues that would have to be addressed if the proposal of the Joint Commenters were to be adopted. At any point in time, this process could break down. The multiple flaws -- procedural, equitable, and legal -- in the proposal and the multiple moving parts make implementation of the Joint Commenters' plan almost impossible. Even if they are addressed, the Commission must cross its fingers, micromanage, and hope that the intricate process does not break down over the four year period. If it does break down, the Public Safety entities, about whom this proceeding was initiated, may be worse off then they are now.

B. Nextel's Offer To Pay Into A Relocation Fund Over Time Is No Different Than the Disastrous C Block Installment Payment Mechanism.

Nextel's offer to fund the rebanding also suffers from a serious flaw. Like the overall proposal, the funding mechanism is too complicated and offers too many opportunities for problems to arise. While Nextel proposes to fund up to \$850 million for realignment of the 800 MHz band, "*provided* that the Commission grants Nextel a replacement 10 MHz nationwide CMRS license at 1910-1915/1990-1995,"¹⁴ it will only make contributions over time.¹⁵ Nextel states that "within five business days of the effective date of the Commission's Report and Order adopting the Consensus Plan, [it] will make an initial \$25 million cash contribution to the Fund, and will continue to make periodic contributions so that the Fund Administrator has funds on deposit from which to pay Plan retuning costs."¹⁶ The result is that Nextel is using an installment-type mechanism to make a 3% down payment on its pledge -- in essence receiving more than a billion dollars worth of spectrum for only a \$25 million dollar initial payment.

¹⁴ *Id.* at ii-iii.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

This installment payment approach should be all too familiar to the Commission and should be avoided at all costs. The Commission's recent experiment with an installment payment mechanism was a categorical failure. Nextel, however, is trying to resurrect this payment mechanism to secure an interest-free loan from taxpayers in order to fund its relocation to much more valuable spectrum. This proposal places the Commission once again in the untenable position of having to rely on the good intentions of a licensee that it will make all of its payments. Any party that suggests that Nextel's pledge of the 1.9 GHz licenses ensures payment of the full \$850 million need look no further than the NextWave proceeding and the recent Supreme Court decision to judge the error of this path.¹⁷ Accordingly, Nextel's December 24th funding pledge should be viewed with the same skepticism as its earlier \$500 million dollar pledge -- a monetary commitment that contains no guarantee.

C. Nextel's Offer To Subsidize The Rebanding And Relocation Of The 800 MHz Incumbents Is Capped And Offers No Solution If Costs Exceed Estimates.

Nextel proposes to "fund, *up to a total of \$850 million, the relocation of all 800 MHz incumbents* – not just public safety licensees – required to move pursuant to the Consensus Plan."¹⁸ However, if the Joint Commenters do not offer any solution as to what the Commission and Public Safety should do if Nextel funds are insufficient to complete rebanding. If this occurs

¹⁷ Federal Communications Commission v. NextWave Personal Communications, Inc., No. 01-653 (U.S. Jan. 27, 2003); In re Federal Communications Commission, 217 F.3d 125 (2000); In re NextWave Personal Communications, Inc., 244 B.R. 253 (Bkrcty. S.D.N.Y. 2000); In the Matter of Public Notice DA 00-49, Auction of Cond F Block Broadband PCS Licenses, Order on Reconsideration, 15 FCC Rcd. 17500 (2000); Public Notice, Auction of C and F Block Broadband PCS Licenses, 15 FCC Rcd. 693 (2000); FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.), 200 F.3d 43 (1999); NextWave Personal Communications Inc. v. FCC 241 B.R. 311 (S.D.N.Y. 1999); In re NextWave Personal Communications, Inc., 235 B.R. 314 (Bkrcty. S.D.N.Y.); In re NextWave Personal Communications, Inc., 235 B.R. 263 (Bkrcty. S.D.N.Y. 1998).

¹⁸ *Supplemental Comments* at ii-iii.

during one of the multiple phases of rebanding, the resulting interference impact on Public Safety could be greater than if no movement had occurred.

It is not inconceivable that this situation could arise. For example, the Joint Commenters visited 16 public safety systems throughout the country in order to gather information regarding their equipment for cost estimates. However, the Joint Commenters admit that “this sample is biased somewhat toward large, complex public safety communications systems.”¹⁹ As a result, the unique nature of smaller Public Safety systems is not factored into the cost equation.

While Nextel is “highly confident that its commitment will cover the reasonable returning/relocation costs of [the] 800 MHz incumbent public safety licensees pursuant to the Consensus Plan,” the Public Safety organizations believe that “there continues to be uncertainty as to the number of radios that will need to be replaced as part of the plan, which could have a significant impact on the total costs.”²⁰ In reaching their cost estimate, the Joint Commenters estimate that only 1% of the public safety radios will have to be replaced.²¹ If the smaller Public Safety operations not factored in to the cost equation need a greater number of handset replacements, the costs could increase dramatically. The Joint Commenters note in their proposal that “the substantial cost difference between replacing and reprogramming a radio is such that small variations in the total number of radios to be replaced will have a significant impact on the total cost of implementing the Consensus Plan.”²² This “significant impact” could rapidly consume the assets of the fund. As stated above, if the fund is depleted before transition is completed, Public Safety and other 800 MHz licensees could find themselves worse off than if the transition had not occurred at all.

¹⁹ *Id.* at Appendix A-1, n.1.

²⁰ *See Id.* at 6.

²¹ *See Id.* at 6, Appendix A-4.

²² *Id.* at 6-7.

III. SIMPLER, BETTER SOLUTIONS EXIST THAN THE “CONSENSUS” PLAN

A. CTIA’s Proposal Provides Effective Solutions That Will Address The Interference Problems And Will Provide Public Safety With Upgraded Equipment.

As detailed above, the Joint Commenters’ plan to reband 800 MHz is both inadequate and unworkable. Unlike the CTIA plan, which provides short, medium, and long-term solutions to the problem, the Joint Commenters’ plan does not provide Public Safety with spectrum in which it can operate in an environment where it is free from interference. Instead, the plan proposes to relocate Public Safety and the majority of 800 MHz licensees within the 800 MHz band, and relocate Nextel outside of the band. This move benefits Nextel, but fails to completely address the core issue in this proceeding -- interference. In fact, throughout the plan, the Joint Commenters discuss the continued remediation that would have to take place even *after* their plan is *fully* implemented.²³ The Commission should instead look to a plan, such as CTIA’s plan summarized below, that provides immediate relief through mitigation, and then addresses the goal of providing Public Safety with a spectrum home where it can operate free from interference.

1. Focused technical mitigation efforts will provide immediate relief from interference to Public Safety operations.

As CTIA stated in its original Comments in this proceeding, as an *immediate* first step to ameliorate the interference problems, the Commission should build on existing efforts to address

²³ See *Id.* at 39-44; see also *Joint Reply Comments of Aeronautical Radio Inc, et al.*, Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, WT Docket No. 02-55 (Aug. 7, 2002) (“Joint Comments”) at 15 (stating that “Nextel and other CMRS licensees would continue to mitigate any incidence of CMRS-Public Safety interference . . . throughout the retuning process and *thereafter*.” (emphasis added)); Joint Comments at 21 (stating that “interference will be mitigated in the *vast majority* of cases in the 800 MHz band [and that] relocating NPSPAC licensees . . . will *significantly lower* the probability that intermodulation products . . . will cause interference to public safety radio systems.” (emphasis added)).

interference incidents by organizing a special task force of wireless carrier and Public Safety representatives to ensure even better coordination of efforts to eliminate interference to Public Safety users on a case-by-case basis.²⁴ The efforts of Nextel and the cellular carriers to solve the interference problems identified by Public Safety organizations demonstrate that case-by-case mitigation efforts can have a significant positive impact to address interference incidents as a near-term measure. Experience has shown that utilization of best practices and coordination efforts can mitigate the vast majority of the interference problems. Given the successful track record of good faith case-by-case mitigation, this approach would provide the Commission with immediate action, allowing them to then focus on those cases, if any, where industry-led mitigation efforts are not successful in resolving the interference.²⁵

While the Joint Commenters state early in their *Supplemental Comments* that they will “surrender” spectrum at “700 MHz, 800 MHz, and 900 MHz to make possible the Land Mobile Radio band realignment necessary to solve CMRS – public safety interference,” they later reveal that the problem will not in fact be “solved” by their relocation proposal. In fact, the Joint Commenters state that even after rebanding, incidents of interference will remain that have to be addressed with mitigation efforts.²⁶ If the Joint Commenters believe that their mitigation efforts

²⁴ See *Comments of the Cellular Telecommunications & Internet Association, Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55 (May 6, 2002) (“CTIA Original Comments”).

²⁵ See *CTIA Original Comments* at 7-8.

²⁶ *Supplemental Comments* at 39-44, Appendix F. (According to the *Supplemental Comments*, in some cases, more than 1/3 of the incidents of interference will remain after the rebanding is complete.). *Id.* at Appendix F.

will work as part of the follow up, why can't they be employed as the primary measure to address interference from the outset?²⁷

As CTIA has detailed above, and in its previous Comments, experience to date has been that any interference caused by cellular licensees can be effectively addressed by technical mitigation techniques, and may not require the major step of relocating all of the 800 MHz incumbents as a remedy. A special task force of wireless carrier and Public Safety representatives would ensure even better coordination of efforts to eliminate interference to Public Safety users on a case-by-case basis. This effort should be initiated, and given a chance to work, before the Commission takes any other steps in this proceeding. Using mitigation *first* will allow for the most timely, least costly, solution to many of the incidents of interference.

2. If necessary, rebanding of the 800 MHz band within the band will help alleviate interference in the near term.

If the Public Safety entities ultimately find that the mitigation steps outlined above do not adequately address interference concerns, as a next step, the Commission should consider a plan that restructures the 800 MHz band spectrum assignments *within* the 800 MHz band. If it can be demonstrated that the 800 MHz band can be rebanded in a way that minimizes interference, the incumbent 800 MHz licensees should be made whole, not more, *within* that MHz band. CTIA does not support any rebanding alternatives that affect spectrum in the 1.9 GHz bands, although consideration of “swap” options involving the 700 and 900 MHz bands might be appropriate.

²⁷ See *Id.* at Appendix F. (Note that unlike the cooperative approach used in the Best Practices Guide, Appendix F proposes a change whereby the burden of resolving interference may rest solely with the CMRS industry. In particular, the Joint Commenters suggest several blanket rules to address interference mitigation. This approach differs markedly from the Best Practices Guide, which calls for “cooperation to determine the most efficient allocation of costs and resources [taking into account] the factors involved in a particular situation.” The Joint Commenters have not justified a move away from the successful cooperative approach of the Best Practices Guide.); see <http://wireless.fcc.gov/publicsafety>.

As CTIA stated in its original comments, implementation of the 800 MHz rebanding can begin immediately where needed to mitigate observed interference, with Public Safety migrating out of interleaved channels on a negotiated, city-by-city basis. Rebanding of 800 MHz by relocating incumbents within the band must be accomplished in a way that minimizes harmful interference and ensures each licensee involved in the rebanding maintains its current operational capabilities and subscriber capacity. Such a step must be both cost effective and interim in nature.

The migration could be paid for as an essential part of the nation's Homeland Security activities, or through other sources of public funds. In particular, a relocation fund approach similar to the Administration's proposed Relocation Fund²⁸ could be used to fund the rebanding required to address Public Safety interference, when future spectrum auctions occur. Where all licensees are operating within the Commission's rules, there is no basis to require CMRS or B/ILT licensees to involuntarily fund Public Safety relocations, or to bear their own relocation expenses.

3. The best long-term solution for Public Safety is to use spectrum in the 700 MHz band to deploy a state-of-the-art wireless network.

While CTIA agrees that some rebanding of 800 MHz may make sense, the optimal solution to Public Safety's requirements for interference-free and interoperable networks is to redeploy their systems in the 700 MHz band. This will allow Public Safety to operate interference free, *and* will allow them to upgrade their equipment. This relocation and equipment upgrade could be fully funded by the proceeds of the auction of the spectrum that would be vacated in the 800 MHz band. By contrast, under the Joint Commenters' proposal,

²⁸ While CTIA recognizes that the Commission currently does not have the statutory authority to implement a relocation fund, the Administration proposed such legislation during the last Congress and it is anticipated that the legislation will be introduced again this session.

only 1% of handsets would be upgraded/replaced, resulting in disruption to Public Safety during the transition -- without any significant improvement in their communications capabilities.

As CTIA said in its original comments, any 800 MHz rebanding should only be an interim step, while the Commission and Congress undertake efforts to reallocate spectrum in the 700 MHz band and provide for the orderly relocation of incumbents.²⁹ The Commission should work with the wireless industry, Public Safety, and other affected parties -- including Congress to the extent legislation is necessary -- to cooperate in allocating and transferring the requisite amount of spectrum in the 700 MHz band to Public Safety/Critical Infrastructure uses.

IV. THE OUTRIGHT GRANT OF SPECTRUM TO NEXTEL OUTSIDE OF THE 800 MHZ BAND IS NOT NECESSARY AND IS NOT IN LINE WITH THE COMMISSION'S EFFORTS TO PROMOTE SOUND SPECTRUM MANAGEMENT

A. It Is Not Necessary To Grant Nextel Additional Spectrum Outside the 800 MHz Band In Order To Address the Interference Issue.

CTIA continues to oppose the proposal to give Nextel 10 MHz of contiguous spectrum outside of the 800 MHz band. CTIA has argued throughout this proceeding that commercial licensees in the 800 MHz band, including Nextel, should not receive additional spectrum inside or outside of the 800 MHz band without having to pay for such spectrum through the auction process. The Commission must maintain the integrity of its auction and spectrum allocation processes throughout this proceeding.

The Joint Commenters have argued in this proceeding that “to satisfy the public interest using the industry-wide Consensus Plan, Nextel would lose approximately 10.5 MHz of

²⁹ See CTIA Reply Comments at 6. (“CTIA acknowledges that the Commission currently does not have the statutory authority to reallocate spectrum in the 700 MHz band, and obtaining such authority will require a concerted joint effort by both the industry and the Public Safety community. CTIA would actively support Federal legislation to enable the Commission to reallocate *and* clear spectrum in the 700 MHz band, provided that the spectrum is specifically set aside as a relocation band for Public Safety/Critical Infrastructure uses.”).

spectrum [and that] Nextel must be made whole through an alternative spectrum allocation of 10 MHz at 1910-1915/1990-1995.”³⁰ Under the proposal, however, Nextel is more than made whole. First, the Joint Commenters’ rebanding plan is done in a way that results in Nextel “losing” spectrum that must then, they argue, be replaced. Other rebanding approaches in the record would not lead to that result.³¹ Under the Joint Commenters’ Plan, in exchange for that “lost” spectrum, Nextel would not only receive 10 MHz of contiguous spectrum in return for the scattered spectrum that it returns, but that compensatory spectrum would be located in a band that is adjacent to the top of the existing PCS band.³² This grant of spectrum in the 1.9 GHz band is *not* necessary to achieve a rebanding of the 800 MHz band to resolve the Public Safety interference problem.

B. Any Outright Grant Of Spectrum To Nextel Without Nextel Having To Go Through An Auction Violates Section 309 (j) and Would Be Susceptible To A Legal Challenge.

As CTIA has stated in previous comments, in the event Nextel were “given” any spectrum outside the 800 MHz band to be used for terrestrial services, this spectrum grant would be inconsistent with Section 309 (j) of the Communications Act. That section of the Act requires that spectrum made available for commercial terrestrial services be auctioned.³³ Nextel can

³⁰ Joint Comments at 18-19.

³¹ See, e.g., *Reply Comments of Motorola, Inc.*, Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, filed Aug. 7, 2002.

³² See *Supplemental Comments* at ii-iii. Of the 10 MHz that Nextel would receive under the Joint Commenters’ Plan, 5 MHz would come from Unlicensed PCS at 1910-1915 MHz and the other 5 MHz would come from reallocated MSS spectrum at 1990-1995 MHz. The upper 5 MHz of spectrum that Nextel seeks currently is the subject of an ongoing proceeding at the FCC. The extensive investment already deployed in the 1.9 GHz band by the CMRS industry would enable Nextel to benefit from enormous economies of scale if it sought to deploy equipment in this band.

³³ Section 309(j) of the Omnibus Budget and Reconciliation Act of 1993 requires the Commission to grant a license or permit to a qualified applicant only through a system of competitive bidding, unless there are no mutually exclusive applications or the licenses fall into

provide no legal justification for the Commission to avoid its obligations under Section 309 (j) in order to provide the company with a spectrum windfall.

As CTIA has highlighted above, the spectrum being considered by Nextel is adjacent to the top of the existing PCS band. If the Commission were to auction the 1.9 GHz spectrum that Nextel is seeking as “compensation” for turning in pieces of spectrum in three bands, other members of the CMRS industry surely would be interested in participating, triggering the mutual exclusivity provision of Section 309 (j). Accordingly, any outright grant of spectrum to Nextel without Nextel having to go through an auction would be susceptible to a legal challenge since any spectrum reallocated for a terrestrial service in the MSS or unlicensed PCS bands must be auctioned.³⁴ The likelihood that legal proceedings would derail the entire 800 MHz “Consensus Plan” approach is a significant risk that the Commission need not, and should not, take.

C. Nextel Should Also Not Receive Spectrum Outside the 800 MHz Band Before Any Transition Involving Nextel Spectrum Is Complete.

As CTIA stated above, the Commission should not grant Nextel any spectrum outside the 800 MHz band. If, however, the Commission should determine that Nextel should receive such spectrum, it should not make that spectrum available to Nextel before *completion* of any rebanding plan. Under the current Joint Commenters’ proposal, Nextel wishes to receive 10

certain specified exceptions that do not apply to Nextel. *See* Omnibus Budget and Reconciliation Act, Title VI, § 6002(a), (b)(1)), Pub. L. No. 103-66, 107 Stat. 387, 392, (Aug. 10, 1993) (codified at 47 U.S.C. § 309(j) *et seq.*). *See also*, In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 7 FCC Rcd 2348 (1994).

³⁴ *See* CTIA’s Comments, *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, IB Docket No. 01-185, ET Docket No. 95-18 (Oct. 22, 2001) at 7; CTIA’s Reply Comments, *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, IB Docket No. 01-185, ET Docket No. 95-18 (Nov. 12, 2001) at 4.

MHz of spectrum immediately upon adoption of the FCC's Order.³⁵ This will lead to the problem highlighted in Section II.B. above. Nextel will have received 10 MHz of spectrum in exchange for a \$25 million downpayment and a potentially unenforceable commitment to fund relocation.

CTIA submits that too much is at stake regarding potential impact to Public Safety for the Commission to simply take Nextel's word that it will fully fund relocation. Awarding Nextel spectrum before it completes the tasks for which it is receiving the spectrum will minimize its incentive to pursue completion of the relocation. Moreover, it does not take much imagination to envision a variety of scenarios in which Nextel would not be able to fulfill its funding commitment for reasons entirely beyond its control. As stated above, the Commission's recent experiences in proceedings involving spectrum licenses and installment payments should provide enough incentive for the Commission to avoid this scenario.

³⁵ See *Supplemental Comments* at ii-iii.

V. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission not implement the Joint Commenters' plan and should instead adopt CTIA's proposal as set forth in these Comments. The Commission should conduct a rigorous cost/benefit analysis as part of any decision in this proceeding, and as these comments have demonstrated, the costs in terms of time and resources of the Joint Commenters' Plan far outweigh the uncertain benefits and legal risk involved.

Respectfully submitted,

/s/ Michael Altschul

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